



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS-HQ-ES-2021-0014; FF09E30000 FXES11140900000 234]

RIN 1018-ZA07; 1018-ZA08

U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policies.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the revised Mitigation Policy and the Endangered Species Act (ESA) Compensatory Mitigation Policy. The revised Mitigation Policy establishes fundamental mitigation principles and provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, no net loss of resources and their values, services, and functions resulting from proposed actions. The ESA Compensatory Mitigation Policy adopts the mitigation principles established in the Mitigation Policy, establishes compensatory mitigation standards, and provides guidance for the application of compensatory mitigation through implementation of the ESA.

DATES: The policies are effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: The revised Mitigation Policy is available at <https://www.fws.gov/policy/a1501fw2.pdf>. The revised ESA Compensatory Mitigation Policy is available at <https://www.fws.gov/policy/a1501fw3.pdf>. In addition, both policies are available at <https://www.regulations.gov> in Docket No. FWS-HQ-ES-2021-0014.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, by mail at U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041-3803; by email at craig_aubrey@fws.gov; or by telephone at 703-358-2442. Individuals

in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point of contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

Consistent with the mission of the Service and congressional direction through the Fish and Wildlife Coordination Act, as amended (16 U.S.C 661–667(e)); the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*); and similar environmental statutes, the Service has the responsibility to ensure that impacts to fish, wildlife, plants, and their habitats are considered when actions are planned, and that those impacts are mitigated so that these resources may provide a continuing benefit to the American people.

The purpose of the revised Mitigation Policy is to provide guidance to Service personnel in formulating and delivering recommendations and requirements to action agencies and project proponents so that they may avoid, minimize, and compensate for action-caused impacts to species and their habitats, and uses thereof. The revised Mitigation Policy establishes fundamental mitigation principles and provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, no net loss of resources and their values, services, and functions resulting from proposed actions. The primary intent of the revised Mitigation Policy is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales.

The purpose of the ESA Compensatory Mitigation Policy is to provide guidance to Service personnel as they seek to mitigate losses to endangered and threatened species and their habitats resulting from proposed actions to further the purposes of the ESA. The ESA Compensatory Mitigation Policy adopts the mitigation principles established in the revised Mitigation Policy, establishes compensatory mitigation standards, and provides guidance for the

application of compensatory mitigation through implementation of the ESA. It covers all compensatory mitigation mechanisms, including, but not limited to, proponent-responsible mitigation, conservation banking, and in-lieu fee programs, and all species and habitats protected under the ESA for which the Service has jurisdiction.

Prior Policies

The Service's original Mitigation Policy (46 FR 7644, January 23, 1981) has guided our recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats since 1981. The revisions reflected in the revised Mitigation Policy are motivated by changes in conservation challenges and practices since 1981, including accelerating loss of habitats, effects of climate change, and advances in conservation science. The revised Mitigation Policy integrates all authorities that allow the Service to recommend or require mitigation of impacts to fish and wildlife resources, and other resources identified in statute, during development processes. It is intended to serve as a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future.

The ESA Compensatory Mitigation Policy serves as the Service's comprehensive treatment of compensatory mitigation under the authority of the ESA. The ESA Compensatory Mitigation Policy clarifies guidance in the Service's "Guidance for the Establishment, Use, and Operation of Conservation Banks," published in the *Federal Register* on May 8, 2003 (68 FR 24753), and "Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species," published in the *Federal Register* on July 31, 2008 (73 FR 44761).

We previously published a Mitigation Policy (81 FR 83440, November 21, 2016) and an ESA Compensatory Mitigation Policy (81 FR 95316, December 27, 2016). We later requested public comment on portions of those policies, specifically comments on the policies' mitigation planning goals (82 FR 51382, November 6, 2017). We subsequently withdrew the Mitigation Policy that was published in 2016 and reinstated the Mitigation Policy that was published in

1981 (83 FR 36472, July 30, 2018). We also withdrew the ESA Compensatory Mitigation Policy that was published in 2016 and reinstated all policies or guidance documents that were superseded by that policy (83 FR 36469, July 30, 2018).

In our withdrawal notices in 2018, the Service concluded, in light of national policy direction reflected in Executive Order (E.O.) 13783, “Promoting Energy Independence and Economic Growth” (82 FR 16093, March 28, 2017); the comments received by the Service; and concerns regarding the legal and policy implications of compensatory mitigation with a mitigation planning goal of net conservation gain, that it was no longer appropriate to retain references to a goal of net conservation gain within the policies. We further concluded that, because the goal of net conservation gain was so prevalent throughout the policies, this concern should be resolved by withdrawing the policies.

Development of the Revised Policies

E.O. 13990, “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis” (86 FR 7037, January 20, 2021), subsequently rescinded E.O. 13783 and called for an immediate review of agency actions taken between January 20, 2017, and January 20, 2021. Consistent with E.O. 13990, the Service evaluated whether to revise and reissue versions of the mitigation policies. The Service considered input we received during three separate public comment periods related to the 2016 mitigation policies. The initial public comment periods solicited input on the proposed revisions to the Mitigation Policy (81 FR 12380, March 8, 2016), and on the draft ESA Compensatory Mitigation Policy (81 FR 61031, September 2, 2016). We later requested additional public comment on the mitigation planning goal within both mitigation policies that had already been finalized (82 FR 51382, November 6, 2017). The documents, comments, and process related to prior revisions are not summarized here, but may be viewed within docket number FWS-HQ-ES-2015-0126 (mitigation) and docket number FWS-HQ-ES-2015-0165 (compensatory mitigation) on <https://www.regulations.gov>.

One of the main concerns with the 2016 policies was the inclusion of a mitigation planning goal of net conservation gain. Based on public comments, changes in Executive Orders, and policy considerations, the Service has removed reference to a mitigation planning goal of net conservation gain from both policies. We have also added information clarifying that the Service's mitigation planning goal is to maintain the current status of affected resources (i.e., no net loss) and that the Service's mitigation recommendations and requirements should focus on important, scarce, or sensitive resources and be consistent with applicable statutory authorities and the responsibilities of action proponents.

In the 2018 notice to withdraw the policies, the Service cited concerns regarding inconsistencies between the policies and concepts in the opinions of *Koontz v. St. Johns River WMD*, *Nollan v. California Coastal Commission*, and *Dolan v. City of Tigard*, which identified appropriate sideboards regarding the links between an action and compensatory mitigation to offset the effects of that action. Those opinions call for an "essential nexus" between an action's effects and compensatory mitigation, as well as ensuring that mitigation is proportional to the action's effect. The Service has incorporated those concepts in the revised policies. The Service will implement these mitigation policies in a manner that is consistent with the *Koontz* case and any other relevant court decisions. Specifically, we have added "nexus and proportionality" as a fundamental mitigation principle for both policies to reinforce that appropriate mitigation measures must have a clear connection with the anticipated effects of the action and be commensurate with the scale and nature of those effects.

In light of the rescission of E.O. 13783, the changes to the policies described above, and the need for the Service to have modern mitigation policies, we again finalize the revised Mitigation Policy and the ESA Compensatory Mitigation Policy.

The Mitigation Policy and ESA Compensatory Mitigation Policy are non-binding, do not establish legally binding rules, and are internal Service policies intended only to improve the internal management of the Service.

National Environmental Policy Act

We have analyzed the final revised policies in accordance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) and the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508). Issuances of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). The policies fit within this category and are therefore excluded from further analysis.

Authority

The multiple authorities for this action include the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661–667(e)); and National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Martha Williams,

Director,

U.S. Fish and Wildlife Service.

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